IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

FRIDAY, THE 1ST DECEMBER 2006 / 10TH AGRAHAYANA 1928

OP.No. 27461 of 1999(T)

PETITIONER:

A. SANKARA NARAYANA MENON,
S/O. GOVINDA MENON,
MANAGING PARTNER, `AISWARYA MOVIES',
PONANI, MALAPPURAM DISTRICT.

BY ADV. SRI.T.KRISHNAN UNNI.

RESPONDENTS:
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1. **STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM.**
2. **THE DISTRICT COLLECTOR, MALAPPURAM.**
3. **THE REVENUE DIVISIONAL OFFICER, TIRUR, MALAPPURAM DISTRICT.**
4. **THE TAHSILDAR, PONANI TALUK, MALAPPURAM DT.**

BY SPL. GOVERNMENT PLEADER (TAXES) SRI. JILIAN XAVIER.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 01/12/2006,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

prv.

ORDER ON C.M.P. NO. 46508/1999 IN O.P. NO. 27461/1999

DISMISSED

01/12/2006. **SD/- A.K.BASHEER, JUDGE.**

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE ASSESSMENT ORDER NO. 4317/94 DT. 23/06/97 BY R4.

EXT.P.2: COPY OF THE ASSESSMENT ORDER NO. A7.2370/96 DT. 07/08/96 BY R4.

EXT.P.3: COPY OF THE PROCEEDINGS NO. REF.C.2717/96 DT. 06/12/96 BY R3.

EXT.P.4: COPY OF THE JUDGMENT IN O.P. 3419/98 DT. 03/07/98 OF THIS HONOURABLE COURT.

EXT.P.5: COPY OF THE JUDGMENT IN W.A. NO. 2132/98 DT. 10/11/98 OF THIS HONOURABLE COURT.

EXT.P.6: COPY OF THE PROCEEDINGS REF. 5216/99/K DT. 25/10/99 BY R3.

//TRUE COPY//

prv.

A.K. Basheer, J.

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O.P. No. 27461 of 1999

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Dated this the 1st day of December, 2006.

J U D G M E N T

The short question that arises for consideration in this Original Petition is whether the appellate authority was justified in invoking the power of "rectification" envisaged under Section 15 of the Kerala Building Tax Act 1975, (for short the Act), in the facts and circumstances of the case.

2. Petitioner who owns a cinema theatre was assessed under the Act and directed to pay an amount of Rs.12,000/- towards tax by the assessing authority in Ext.P1 order dated June 23, 1994. After more than 2 years, the successor in office reopened the above assessment order and found that petitioner was liable to pay Rs.72,000/- as tax instead of Rs.12,000/- as found earlier. Ext.P2 is the revised order passed by the assessing authority.

3. The above order was challenged by the petitioner before the appellate authority, the Revenue Divisional officer. By order dated December 6, 1996 the revised order of the assessing authority was set aside by the appellate authority. A copy of the said order is on record as Ext.P3. But the revisional authority, the District Collector, in exercise of the power of revision under Section 13 of the Act, called for the records and set aside the order of the appellate authority. The said order of the revisional authority was challenged by the petitioner before this Court. In Ext.P4 judgment, this Court found that there was dispute with regard to the plinth area of the building and therefore the matter was remitted back to the assessing authority.

4. Petitioner challenged the above judgment before a Division Bench of this Court . While allowing the appeal the Division Bench found that the District Collector had no power under Section 13 of the Act to revise an order suo motu, if the order in question had been passed more than 3 months earlier. Ext.P5 is the true copy of the judgment of the Division Bench which was passed on November 10, 1998.

5. But on October 25, 1999 the appellate authority suo motu reviewed its earlier order (Ext.P3) by invoking the power under Section 15 of the Act. The authority held that there was error in reckoning the actual plinth area and therefore the assessing authority was justified in revising the order of his predecessor. Consequently the appellate authority took the view that his predecessor had committed serious error in allowing the appeal of the assessee. Thus, while upholding the revised order of the assessing authority passed under Ext.P2, the appellate authority directed the petitioner to remit the balance amount of tax viz., Rs.60,000/-. The said order, a copy of which is on record as Ext.P6, is under challenge in this Original Petition.

6. Relevant clauses of Section 15 of the Act are extracted hereunder:

> "15. Rectification of mistake:--
>
> (1) The appellate authority or the revisional authority may, at any time within three years from the date of an order passed by it on appeal or revision, as the case may be, and the assessing

> authority may, at any time within three years from the date of any assessment or order passed by it, of its own motion, rectify any mistake apparent from the record of the appeal, revision, assessment or order, as the case may be, and shall, within the like period, rectify any such mistake which has been brought to its notice by an assessee:
>
> Provided that no such rectification shall be made which has the effect of enhancing an assessment or reducing a refund unless the assessee has been given a reasonable opportunity of being heard in the matter.
>
> (2) .....
>
> (3) ..... " (emphasis supplied)

7. A perusal of the above provisions unambiguously shows that the appellate authority has egregiously erred in arrogating to itself the purported power of rectification envisaged under Section 15 of the Act. It is undoubtedly true that the appellate authority or the revisional authority may at any time within 3 years from the date of an order passed by it on appeal or revision as the case may be, of its own motion rectify any mistake apparent from the record of the appeal or revision. In the case on hand, the appellate authority has in fact embarked upon review of the order passed by his predecessor in office about 3 years ago. Curiously the appellate authority found that the appeal filed by the petitioner/assessee ought not to have been allowed

on the ground that the assessing authority had no jurisdiction to reopen the assessment. This exercise of the appellate authority is apparently bad for two reasons:

(a) The power envisaged under Section 15 of the Act is not a power of review at all. The power vested with the authorities concerned under Section 15 is only rectification of "any mistake apparent from the record" (emphasis supplied). The appellate authority while issuing Ext.P6 order has apparently exceeded its jurisdiction.

(b) The order passed by the appellate authority at the first instance (Ext.P3) was suo motu revised by the District Collector, which in turn was set aside by the Division Bench of this Court in Ext.P5 judgment. Therefore the order of the appellate authority which had merged in the subsequent order passed by the higher statutory authority did not have any existence. For the above reason also the present order passed by the appellate authority in purported exercise of "rectification" is ex facie illegal and vitiated. Therefore I have no hesitation to hold that Ext.P6 order cannot be sustained.

8. It is trite that the "doctrine of Merger" which is founded on principles of propriety in the hierarchy of justice delivery system, is based on the logic that there cannot be more than one decree or operative order governing the same subject matter at a given point of time. Their Lordships of the Supreme Court in Kunhayammed & Ors. v. State of Kerala & Anr. (2000 SAR (Civil 698) while reiterating the above principle, held further that "where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies,

reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law."

9. As has been noticed already, the earlier order passed by the appellate authority had merged in the order of the revisional authority. More importantly, the Division Bench of this Court had given finality to the issue by quashing the order of the revisional authority. Thus the assessment which had become final, could not have been reopened by any of the statutory authorities invoking the power of rectification. As observed earlier, no ground existed "to rectify any mistake". Even assuming such a mistake was apparent, still no statutory authority under the Act could have reopened the issue either by way of review or rectification, since the issue had been concluded by the judgment of this Court. Therefore Ext.P6 is liable to be quashed. I do so.

Original Petition is allowed.

A.K. Basheer
Judge.

an.

A.K. Basheer, J.

O.P.No. 27461 of 1999

Judgment

1/12/2006